

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

Rulemaking to Amend Parts 1, 2, 21, and 25  
of the Commission's Rules to Redesignate  
the 27.5-29.5 GHz Frequency Band, to  
Reallocate the 29.5-30.0 GHz Frequency  
Band, to Establish Rules and Policies for  
Local Multipoint Distribution Service  
and for Fixed Satellite Services

CC Docket No. 92-297

To: The Commission

**COMMENTS OF THE INDEPENDENT ALLIANCE**

The Independent Alliance hereby submits its Comments in response to the Commission's Sixth Notice of Proposed Rule Making in the captioned proceeding.<sup>1</sup> The Commission seeks comment on whether it should allow the eligibility restriction<sup>2</sup> for the Local Multipoint Distribution Service ("LMDS") to sunset on June 30, 2000, as scheduled, or whether there exists good cause to extend the restriction. The

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1 In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Sixth Notice of Proposed Rule Making*, CC Docket No. 92-297, FCC 99-379, released December 13, 1999 ("*Sixth Notice*").

2 The LMDS eligibility restriction prohibits an incumbent local exchange carrier ("LEC") or incumbent cable company, or any entity with an attributable interest in these incumbents, from having an attributable interest in an LMDS license whose geographic service area significantly overlaps the incumbent's service area. 47 C.F.R. § 101.1003(a).

Independent Alliance, which has been an interested party in this proceeding since its inception,<sup>3</sup> submits these Comments in support of the sunset of the eligibility restriction as scheduled.

## **I. Background**

The Independent Alliance is a group of rural telephone companies that share a common interest in ensuring that they have the opportunity to deploy LMDS within their existing service areas in a meaningful and useful fashion. Some members of the Independent Alliance participated in the Commission's LMDS auction and, pursuant to eligibility rules upheld by the U.S. Court of Appeals for the District of Columbia, complied with the Commission's requirement to divest "ineligible" geographic areas.

The Independent Alliance has maintained throughout the LMDS proceeding that the LMDS eligibility restriction, particularly as applied to small and rural companies, inhibits the prompt and efficient deployment and utilization of advanced technologies. The slow pace of LMDS implementation underscores the validity of this position. Even if imposition of a short-term restriction in 1997 were a reasonable prophylactic measure based upon predicted occurrences, experience now demonstrates that sunset of the restriction as scheduled is not only appropriate, but necessary.

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<sup>3</sup> See e.g., Reply Comments of the Independent Alliance (filed Aug. 22, 1996), *First Report and Order and Fourth Notice of Proposed Rulemaking*, 11 FCC Rcd 19005 (1996). See also, Petition for Reconsideration of the Independent Alliance (filed May 7, 1997), *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545 (1997) ("*Second Report and Order*").

## II. The LMDS Eligibility Restriction Should Sunset On Schedule

### A. The Commission's Goal Of Fostering The Development Of LMDS And Competition Would Be Furthered By Sunset Of The Eligibility Restriction.

In adopting the eligibility restriction, the Commission explained that its primary objective was to enhance the possibility of competition in the telephone and multichannel video programming distributor ("MVPD") markets. To further these objectives, the Commission determined that a policy favoring restricted eligibility *for a limited time* would result in the greatest likelihood of increased competition in the local telephone and MVPD markets.<sup>4</sup> The Commission determined that a short-term, rather than a long-term, eligibility restriction would be the best means to increase competition in the local telephony and MVPD markets.<sup>5</sup> The Commission also predicted that the rule *as crafted* would not hinder the introduction of LMDS in rural areas. This finding was upheld by the court in *Melcher v. FCC*,<sup>6</sup> which stated that "the FCC's imposition of a three-year eligibility restriction on rural LECs is fully consistent with a reasonable interpretation of section 309 (j) . . . "<sup>7</sup>

Notwithstanding the imposition of the restriction, and more likely as a result of it, consumer access to LMDS technologies is today very limited. As recognized by the Commission, lack of LMDS equipment, and other factors continue to hinder its

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4 *Second Report and Order*, 12 FCC Rcd at 12616, ¶ 162; *Id.* at ¶ 160.

5 *Id.* at 12623-26, ¶¶ 176-181.

6 *Melcher v. FCC*, 134 F.3d 1143 (D.C. Cir. 1998) ("*Melcher*").

7 *Id.* at 1155.

development.<sup>8</sup> Equipment, including customer premises equipment, remains very expensive, most likely due to lack of demand because of limited deployment. The Commission's goal of swift deployment of competitive technologies has not been achieved by restricting small and rural LECs and MVPDs from participating in the utilization of the technology.

In fact, during the past three years, wireless broadband service offerings have emerged in direct competition to telephone service offerings. These offerings are priced and packaged as direct substitutes for LEC services, and the trend is growing. Small and rural companies should be free to utilize LMDS spectrum to enhance service offerings and respond competitively.

Given the experience of the past several years, there exists no economic or public policy reason for continuing to exclude small and rural providers of local exchange telephone service (or cable service) from the LMDS market. Lifting the existing artificial barriers will promote competitive provision of services and, therefore, serve the public interest.

B. Sunset Will Allow The Commission To Meet The Section 309(j) Mandate.

In addition, as recognized by the *Melcher* court, the requirements of Section 309(j) of the Communications Act of 1934, as amended ("the Act"), to provide rural telephone companies with meaningful opportunities to participate in the provision of

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8 Sixth Notice at ¶¶ 33-37.

wireless services,<sup>9</sup> allow for a reasonable restriction based on the Commission's prediction of injury to competition in the absence of such a restriction. Nonetheless, the Commission is required by the Act to ensure that rural areas are served.<sup>10</sup> For the past three years, Independent Alliance members have been forestalled from providing wireless services via LMDS spectrum. Continuing the restriction beyond June, 2000 could severely hinder small and rural telephone companies' ability to continue to meet their evolving universal service obligations in an economic and efficient manner. Sunset of the three-year restriction will ensure that the Commission fulfills its responsibility to promote opportunities for rural telephone companies to provide wireless services and to further the goals of universal service.

C. The Public Would Be Served By Allowing Small And Rural Telephone Companies To Utilize LMDS Spectrum In Their Service Areas.

In its *Sixth Notice*, the Commission posits that LMDS could be a viable competitor to wireless broadband services.<sup>11</sup> Further, the Commission states that it plans to evaluate whether it should extend the eligibility restriction to avert the possibility of incumbent LECs and cable companies acquiring LMDS to forestall new facilities-based competition for broadband services.<sup>12</sup> In fact, new broadband services, in the

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9 47 U.S.C. § 309(j).

10 47 U.S.C. § 309(j)(3)(A).

11 *Sixth Notice* at ¶¶ 32, 39.

12 *Id.* at ¶ 43.

form of PCS, already exist. Moreover, additional spectrum will soon be available,<sup>13</sup> and satellite services are becoming more competitive with cable.<sup>14</sup> Allowing small and rural companies to utilize LMDS spectrum to compete with existing wireless broadband providers in their service areas promotes both the regulatory and public policy goals of ensuring that consumers receive efficient communications services at reasonable prices. Moreover, freeing small and rural companies to participate fully in the LMDS technology may jump-start the LMDS service<sup>15</sup> in a manner consistent with prior Commission conclusions regarding LEC and cable entry into other markets.<sup>16</sup>

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13 See e.g., Auction of C and F Block Broadband PCS Licenses, Notice of Auction Scheduled for July 26, 2000, *Public Notice*, DA 00-49, released January 12, 2000; see also Amendments to Parts 1, 2 and 101 of the Commission's Rules To License Fixed Services at 24 GHz, *Notice of Proposed Rulemaking*, WT Docket No. 99-327, FCC 99-333, released November 10, 1999; see also Auction of Licenses for Fixed Point-to-Point Microwave Services in the 38.6 to 40.0 GHz (39 GHz) Band Scheduled for April 11, 2000, *Public Notice*, DA 99-2624, released November 23, 1999; see also Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for May 10, 2000, *Public Notice*, DA 00-43, released January 10, 2000.

14 See e.g., In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Sixth Annual Report*, CS Docket No. 99-230, FCC 99-418, released January 14, 2000.

15 For example, LMDS is a logical choice for existing providers to reach underserved areas.

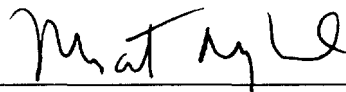
16 See e.g. Amendment of the Commission's Rules to Establish New Personal Communications Services, 8 FCC Rcd 7700, ¶ 126 (1993) ("... we also find that allowing LECs to participate in PCS may produce significant economies of scope between wireline and PCS networks. We believe that these economies will promote more rapid development of PCS and will yield a broader range of PCS services at lower costs to consumers.")

### III. Conclusion

The Independent Alliance submits that the sunset of the LMDS eligibility restriction should occur on schedule. The Commission's goals of fostering competition have not been advanced by excluding participants in the LMDS market. The Independent Alliance further submits that allowing the sunset to occur will enhance its members' ability to compete with existing wireless broadband service providers to the direct benefit of their customers in rural America.

Respectfully submitted,

The Independent Alliance

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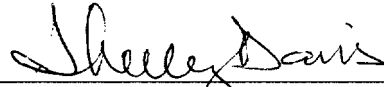
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January 21, 2000

## CERTIFICATE OF SERVICE

I, Shelley Davis, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Comments of The Independent Alliance" was served on this 21st day of January 2000, by hand delivery to the following parties:



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